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Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

ROBERT J. NEVILLE,

Petitioner,

- against -

MILTON MOLLEN, Individually and as Presiding Justice of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, *et al.*,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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July 18, 1988

QUESTIONS PRESENTED

1. Whether a clear misapplication of the doctrine of collateral estoppel by the courts below calls for an exercise of this Court's power of supervision.

2. Whether there is a First Amendment right of public access to information about lawyer disciplinary proceedings.

INTERESTED PARTIES

The following parties have an interest in the outcome of this case:

Robert J. Neville (petitioner), and

Milton Mollen, Presiding Justice of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, Guy J. Mangano, William C. Thompson, Lawrence J. Bracken, Richard A. Brown, Moses M. Weinstein, Isaac Rubin, Charles B. Lawrence, Geraldine T. Eiber, Joseph J. Kunzeman, Sybil Hart Kooper, Arthur D. Spatt, Thomas R. Sullivan, Stanley Harwood, Vincent R. Balletta, Jr., Associate Justices of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department,

Frank A. Finnerty, Jr., Chief Counsel of the Grievance Committee for the Tenth Judicial District, the Grievance Committee for the Tenth Judicial District and each of its members, and

Robert Abrams, Attorney General of the State of New York (respondents).

The members of the Grievance Committee have refused a demand that they identify themselves, and petitioner does not know any of their names.

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner Robert J. Neville respectfully requests that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered in the above-entitled proceeding on March 25, 1988.

OPINIONS BELOW

The opinion of the Court of Appeals was unpublished, and is reproduced in the appendix hereto at page A-1. The oral opinion of Chief Judge Jack B.

Weinstein of the United States District Court for the Eastern District of New York is reproduced at page A-5.

JURISDICTION

Petitioner brought this action pursuant to 42 U.S.C. § 1983. The complaint was dismissed on July 8, 1987 on the grounds of res judicata and collateral estoppel and on the merits. The Court of Appeals affirmed on March 25, 1988 on the grounds of collateral estoppel, and denied a petition for rehearing on May 24, 1988. (A-4)

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

FIRST AMENDMENT: "Congress shall make no law * * * abridging the freedom of speech, or of the press; or of the right of the people peaceably to assemble * * *."

FIFTH AMENDMENT: "[N]or shall any person * * * be deprived of life, liberty, or property, without due process of law * * *."

FOURTEENTH AMENDMENT: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law * * *."

STATUTE: The text of section 90, subdivision 10, of the Judiciary Law of the State of New York appears in the appendix hereto at page A-35.

STATEMENT OF THE CASE

A. The Facts

Petitioner commenced this action in 1987, pursuant to 42 U.S.C. § 1983, for declaratory and injunctive relief, and for damages against the nonjudicial defendants. He sought, among other things, an order declaring section 90(10) of the Judiciary Law of the State of New York to be unconstitutional and permanently enjoining the defendants from applying it, on the grounds that the right of public access to information about formal, lawyer disciplinary proceedings is protected by the First Amendment. Petitioner also alleged a denial of due process of law in certain related state-court proceedings which had preceded the federal court action.

The basic facts in this case, which are not disputed, are that in 1985 petitioner provided the respondents with evidence of serious, proven crimes committed by an attorney, and they refuse to reveal whether, based on that evidence, disciplinary charges have been brought against him.

The attorney is Walter D. O'Hearn, Jr., who was involved in a waterfront corruption scandal in the 1970's. For his wrongdoing, he was censured by the respondent Appellate Division in 1983. (*Matter of O'Hearn*, 89 AD2d 184 [1982], *am, rearg gr* 92 AD2d 925 [1983].) Petitioner alleges, however, that the respondent Grievance Committee for the Tenth Judicial District ("Grievance Committee" or "Committee") covered up most of his crimes, and that the court was thus unaware of the extent of his criminal activity.

Petitioner's interest in O'Hearn's disciplinary record arises from the fact that he suffered substantial financial injury - a few million dollars, based on present interests and values - in one of O'Hearn's many crimes. An estate fraud, it was not discovered until several years after it had occurred, leaving petitioner with hardly any remedy other than to com-

plain to a grievance committee.[1] This he did in 1980; almost two years later, after an alleged "thorough investigation" by two grievance committees, the complaint was dismissed by the respondent Grievance Committee with no explanation other than that no evidence of misconduct had been found. O'Hearn had not been petitioner's attorney, but petitioner has an interest in the estate and the rights of a next of kin of the decedent, for whom O'Hearn was temporarily acting as an attorney (although not at her request).[2]

Largely by coincidence, petitioner's complaint of professional misconduct was pending while the Grievance Committee was reviewing O'Hearn's involvement in the waterfront scandal. When the complaint was dismissed, petitioner objected immediately, writing both to the Committee and to the court. He also inquired about the progress of the formal disciplinary proceeding, but the question went unanswered.

Walter O'Hearn was responsible for the payment of hundreds of thousands of dollars in bribes and for the theft of millions of dollars by his clients and associates. (See A-31 to A-34.) In 1981, an administrative law judge for the Waterfront Commission of New York Harbor determined after extensive hearings that his credibility was "considerably impaired," that he had "committed fraud, deceit and misrepresentation," and that he "lack[s] good character and integrity."

Upon learning in 1984 that O'Hearn had merely been censured and had not even been required to make restitution to those who had been financially injured by his crimes (many steamship companies, for example, had been systematically defrauded by O'Hearn's company, which he admits), petitioner compiled extensive information about the crimes for which no disciplinary charges had been brought and, as stated above, for-

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[1]Petitioner retained two law firms in succession prior to filing the disciplinary complaint. Their performance in investigating the fraud was unsatisfactory. No court proceedings were brought.

[2]The decedent, Eileen F. McGrath, died in 1970. She was O'Hearn's stepgrandmother and petitioner's grandaunt.

warded it to the Committee and to the court in 1985. Four months later, in an attempt to learn whether the disciplinary proceeding had been reopened, he demanded that the Committee reveal whether any charges were pending against O'Hearn.

Petitioner's demands for information from the respondents fall into two categories (simplified here for the purpose of illustration): (1) under the First Amendment, he seeks *information* as to whether a certain judicial proceeding is pending, and (2) pursuant to the New York Freedom of Information Law and the common law, he seeks access to *records* relating to the alleged investigation of his complaint against O'Hearn.

In April 1986, the Grievance Committee rejected petitioner's offer to settle the litigation in an arrangement in which he would have waived his constitutional claims and treated as confidential all information provided by the Committee.

Petitioner's allegations of incompetence and fraud on the part of the Committee, his demands for access to records and the Committee's refusal to comply therewith were, as it turned out, only a prelude to a controversy. Those issues have been virtually overshadowed by his inability to obtain a fair hearing on his claims in the state and federal courts. The state courts dismissed every proceeding that he brought, including appeals. The Appellate Division's dismissal of one appeal taken as of right in 1986 was contrary to settled law. There were no hearings, and there were no judicial opinions.

In federal district court, the first judicial opinion appeared. (Oral opinion, A-5.) After stating several times throughout the hearing that petitioner "may be right," the district judge dismissed the complaint. Two days later, he acknowledged that he had friendships with "all, or most," of the defendant judges. A motion for recusal was promptly granted.

Three of the federal judges who made decisions in this case were involved in other cases challenging the constitutionality of Judiciary Law § 90. The district judge is the same Judge Weinstein who wrote the

29-page dissent in *Mildner* v. *Gulotta*, 405 F.Supp 182 (EDNY, 1975), *affd* 425 U.S. 901, rejecting the Appellate Division's threshold defenses and stating that the statute is unconstitutional (although not on First Amendment grounds). Circuit Judge Miner is the judge who expressed doubts in *Capoccia* v. *Mahoney* (see pp. 12, 13, *infra*) about the constitutionality of the secrecy provision of § 90(10). Circuit Judge Pratt is one of the judges who rejected the collateral estoppel defense in *Capoccia*. (See A-19.)

B. The Proceedings

(Procedural History of *Neville* v. *Mollen* and related cases)

The history of this litigation can be summarized as follows:

Grievance Committee Decision:

> In April 1985, petitioner provided the Grievance Committee for the Tenth Judicial District with evidence of many serious crimes committed by Walter D. O'Hearn, Jr. (crimes unrelated to the subject matter of a complaint which he had made against the attorney). On August 2, 1985, petitioner wrote to the Committee:
>
> > I hereby demand (1) that you disclose to me all of the facts concerning your alleged investigation of my [amended] complaint against the above-named lawyer dated February 9, 1981, (2) that all of your records relating to said investigation be preserved, and (3) that you disclose to me whether there is now pending any review, investigation or proceeding concerning any alleged misconduct by the same lawyer.
>
> In a letter dated August 7, 1985, Frank A. Finnerty, Jr., Chief Counsel of the Committee, replied:
>
> > All records pertaining to the investigation of complaints of alleged misconduct of attorneys are required by law to be kept confidential. Accordingly, our Committee is unable to be of assistance to you.

State Court Proceedings:

> (1a) *MATTER OF NEVILLE* [v. *GRIEVANCE COMMITTEE FOR THE TENTH JUDICIAL DISTRICT*]. **APPELLATE DIVISION** of the Supreme Court of the State of New York, Second Judicial Department. Application on August 16, 1985, pursuant

to Judiciary Law section 90(10), to compel the Grievance Committee to release records and information. No legal papers served; no appearance by the Committee (see 1[b], below). First Amendment right asserted in a supplemental application dated September 17, 1985. Applications denied on November 8, 1985 in an apparent exercise of discretion. (A-23, no opinion)

(1b) Same matter. New York **COURT OF APPEALS**. Appeal taken as of right filed, and withdrawn on agreement of the parties with court approval. In a published report of the jurisdictional statement, petitioner was described as an attorney seeking information about complaints filed against him. MOTION FOR LEAVE TO APPEAL denied in February 1986. Motion for reargument denied. (The Committee appeared in order to oppose the motion for reargument.)

(2a) *MATTER OF NEVILLE* v. *FINNERTY, ET AL.* **SUPREME COURT**, Nassau County. CPLR ARTICLE 78 PROCEEDING commenced in February 1986 pursuant to the New York Freedom of Information Law for a judgment in the nature of mandamus. First Amendment right asserted. Petition dismissed in April 1986 on the grounds that the court lacked jurisdiction and that the first two courts had "already held that * * * relief is inappropriate." (No opinion)

(2b) Same case. **APPELLATE DIVISION**. APPEAL, taken as of right. Motion for transfer to another judicial department, or for leave to appeal to the Court of Appeals, or for time to seek appellate review of denial of motion for transfer. Motion denied in June 1986. A frivolous motion to dismiss this appeal, pursuant to a fictitious court rule, was granted. No reason for the dismissal was given.

(2c) Same case. New York **COURT OF APPEALS**. APPEAL, taken as of right on constitutional grounds. Appeal dismissed on motion in September 1986. MOTION FOR LEAVE TO APPEAL and motion for reargument denied.

(2d) Same case. **UNITED STATES SUPREME COURT**. Petition for writ of certiorari denied in February 1987. (No. 86-1139)

(There were no judicial opinions in the state-court litigation.)

Federal Court Proceedings:

(3a) *NEVILLE* v. *MOLLEN, ET AL.* United States **DISTRICT COURT** for the Eastern District of New York. Action commenced on March 30, 1987 pursuant to 28 U.S.C. sections 1331, 1343, 2201, 2202 and 42 U.S.C. sections 1983 and 1988. Defendants' MOTION TO DISMISS granted by Chief Judge Jack B. Weinstein in June 1987 on grounds of res judicata and collateral estoppel and on the merits. (Oral opinion, A-5) Plaintiff's MOTION FOR RECUSAL granted in July 1987 (no opinion; no written order), and case reassigned to Judge Eugene H. Nickerson. Plaintiff's motions to vacate the order of dismissal and to transfer venue denied in October 1987. (A-18, no opinion)

(3b) Same case. United States **COURT OF APPEALS** for the Second Circuit. APPEAL. Plaintiff's motions (*i*) for injunction pending appeal, (*ii*) for sanctions against defendants' attorney, (*iii*) to strike defendants' brief and (*iv*) for recusal of entire Second Circuit denied. District Court judgment AFFIRMED, in detailed order without opinion (referred to herein as an "unpublished opinion"), on March 25, 1988 on grounds of collateral estoppel: that plaintiff's First Amendment claim had necessarily been decided on the merits by the Appellate Division on November 8, 1985 (1[a], *supra*), and that he had had a full and fair opportunity to litigate. (Pratt and Miner, CJJ.; Walker, DJ.; A-1) Plaintiff's PETITION FOR REHEARING, with suggestion for rehearing *in banc*, was denied on May 24, 1988. (A-4)

Citations:

The above-described decisions were reported as:

Matter of Neville, 67 NY2d 602, 758, 918 (1986). (No opinions)

Matter of Neville v. *Finnerty, et al.* (Supreme Court, Nassau County, No. 21412/85), 68 NY2d 790, 911; 506 N.Y.S.2d 862; 498 N.E.2d 426 (1986); *cert. denied*, — U.S. —; 107 S.Ct. 1306; 94 L.Ed.2d 160 (1987). (No opinions)

Neville v. *Mollen, et al.* (USDC, EDNY, No. CV-87-976), 847 F.2d 835 (CA2, 1988; unpublished opinion).

REASONS FOR GRANTING THE WRIT

I.

PETITIONER WAS DENIED AN ADEQUATE AND FAIR OPPORTUNITY TO BE HEARD IN THE COURTS BELOW

A. The District Court

The District Court determined the merits of petitioner's First Amendment claim on a motion to dismiss, without giving prior notice and opportunity to prepare and submit legal arguments:

> MR. NEVILLE: As far as the complaint itself is concerned, a motion to dismiss only tests the sufficiency of the complaint, without going to the merits. I think now we seem to be going to the merits.
>
> THE COURT: I know, that is because I see no merit in your position as a constitutional matter. [Transcript of hearing on Motion to Dismiss, A-13, A-14]

On the day after the hearing, petitioner complained further about the lack of notice. Shortly thereafter, the District Judge recused himself. (No opinion, no written order; see A-18.)

B. The Court of Appeals

The only issue raised by respondents at oral argument was a new preclusion issue -- one which had not appeared in their answering brief. Following oral argument, petitioner asked that the new argument be disregarded; in the alternative, he asked that the authorities relied upon be disclosed, and that a response be permitted. Respondents promptly cited legal authority (A-28), but petitioner was not given an opportunity to respond. (See A-30.) The new argument was the decisive issue in the appeal.

Petitioner maintained throughout the appeal (in a formal motion, at oral argument and in an application to this Court) that the Second Circuit should recuse itself, as the Third Circuit did in *Stern* v. *Nix*, 840 F.2d 208 (1988), where state appeals-court judges were sued in a constitutional challenge to a feature of Pennsylvania's lawyer disciplinary system.[3]

II.

THE COURTS BELOW ERRED IN APPLYING THE DOCTRINE OF COLLATERAL ESTOPPEL

The District Court applied the doctrine of collateral estoppel on the grounds that petitioner had raised the First Amendment issue in the state courts, rather than on the grounds that it had actually been decided on its merits. (See pages A-6 *et seq.*) Until the day of oral argument in the Court of Appeals, respondents neither identified the judgment which was alleged to have preclusive effect, nor alleged that any of the state-court decisions had been rendered on the merits.

There are numerous exceptions to the general rule of issue preclusion, and most of them apply in this case. Generally, redetermination of an issue is warranted "if there is reason to doubt the quality, extensiveness or fairness of procedures followed in prior litigation." (*Montana* v. *United States*, 440 U. S. 147, 164, n. 11; 1979.)

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[3]The Second Circuit Court of Appeals did not give this Court the opportunity to decide petitioner's application to require recusal. It was necessary to amend and supplement the application as the Court of Appeals (1) denied a motion to postpone oral argument, (2) decided the appeal and (3) denied the petition for rehearing. The application was finally converted into an application to vacate the judgment, which Justice Brennan referred to the Court. Copies of petitioner's Court of Appeals brief and related papers have been filed with the Clerk of this Court. (Applications A-610 and A-789.)

Collateral estoppel does not apply (1) where the party against whom an earlier decision is asserted did not have a full and fair opportunity to litigate (*Allen* v. *McCurry*, 449 U.S. 90, 101; 1980); (2) where the forum in the second action affords greater procedural opportunities (*e.g.*, the rights to argue orally, to be given a reason for the judge's decision and to appeal) (*Restatement of Judgments, 2d*, § 29); (3) where there is a constitutional claim of violation of due process in the state courts (*Lombard* v. *Board of Education of City of New York*, 502 F.2d 631, 635-37; CA2, 1974); (4) where the record is indefinite as to whether the prior decision was rendered on the merits (*Rosenstiel* v. *Rosenstiel*, 21 AD2d 635; 1st Dept., 1964; *affd* 16 NY2d 64); (5) where the determination of the issue was not necessary to the prior decision (*Cameron* v. *Fogarty*, 806 F.2d 380, 384-85; CA2, 1986); (6) where the issue is one of public interest and the decision has affected, or could affect, the rights of numerous other persons (*Restatement of Judgments, 2d*, § 28); (7) where the issue is purely a question of law (*Department of Personnel* v. *City Civil Service Commission*, 94 AD2d 5; 1st Dept., 1983); and (8) where damages were unavailable in the first proceeding, and are sought in the second (*Davis* v. *Halpern*, 813 F.2d 37, 39; CA2, 1987). Courts have been reluctant to accord preclusive effect to a proceeding that is brief and conducted informally (*Curro* v. *Watson*, No. CV-86-2501 [EDNY, 1987], citing *Gargiul* v. *Tompkins*, 704 F.2d 661; CA2, 1983), and the presence and experience of counsel are factors to be considered (*Ryan* v. *New York Telephone Company*, 62 NY2d 494; 1984).

The Second Circuit Court of Appeals determined that the Appellate Division's denial, without comment or opinion, of petitioner's application pursuant to New York Judiciary Law § 90(10) for release of records and information (A-23) constituted a determination on the merits of the First Amendment claim. The Court of Appeals found that the constitutional claim had *necessarily* been determined, and that petitioner had had a full and fair opportunity to litigate.

The New York Court of Appeals, however, had found that the Appellate Division had *not* necessarily determined the merits of the First Amendment claim on November 8, 1985, and it denied leave to appeal. The Second Circuit has now undermined the judgment of the New York Court of Appeals.

There is a right of appeal to the New York Court of Appeals in every case in which a substantial constitutional question is directly involved. This has been construed to mean that the constitutional question must be "not only directly but necessarily involved in the decision of the case." (*Matter of Haydorn* v. *Carroll*, 225 N.Y. 84, 88 [1918], quoted in *Javits* v. *Stevens*, 382 F.Supp 131, 142 [SDNY, 1974], a § 1983 action to declare Judiciary Law § 90 unconstitutional.)

Reproduced in the appendix are a letter from the Clerk of the New York Court of Appeals (A-25), which led petitioner to withdraw his appeal taken as of right, and the table of contents of the memorandum in support of his motion for reargument of the motion for leave to appeal (A-27).

The Second Circuit's reasoning in this case is self-defeating, for it carries with it the implication of a denial of due process in the state courts, namely, that the New York Court of Appeals violated petitioner's constitutional and statutory rights of appeal. Even without the right to appeal on constitutional grounds, petitioner lacked a full and fair opportunity to litigate:

> A full day in court in New York practice includes the appellate process if the loser wants it, and a situation in which appeal is foreclosed can thus be regarded as an inadequate day in court. [Siegel, *New York Practice*, § 465, p. 615.]

Similar in some respects to this case is *Capoccia* v. *Mahoney*, Nos. 83-7022, 83-7134, decided by a panel of the Second Circuit (including Judge Pratt) on March 29, 1983. The unpublished opinion is reproduced on pages A-19 through A-22 of the appendix hereto. A New York attorney facing disciplinary charges, Capoccia waived confidentiality and demanded a public hearing. After the Appellate Division, Third Depart-

ment, denied his request, he filed a second and a third application, asserting a constitutional right to an open hearing. These applications, made pursuant to Judiciary Law § 90(10), were denied without comment, and leave to appeal was denied by the New York Court of Appeals. In the § 1983 action which followed, the Second Circuit rejected the defense of collateral estoppel, stating that it saw "no basis for believing that Capoccia will not have * * * another opportunity to challenge" the constitutionality of Judiciary Law § 90(10) in the state courts. (A-21) (See also *Matter of Capoccia*, 59 NY2d 549; 1983.)

Judge Roger J. Miner, then sitting as a district judge, expressed grave reservations in *Capoccia* about the constitutionality of the secrecy provision of Judiciary Law § 90(10). Permission to cite *Capoccia* in this petition was granted by the Clerk of this Court after Judges Pratt, Miner and Walker had denied permission.

The authority of the Appellate Divisions to entertain and grant requests for disclosure of information pursuant to Judiciary Law § 90(10) is discretionary, and the denial of an application, without more, does not signify a determination on the merits of a claim.[4] In order to deny petitioner's application, it was not necessary for the Appellate Division to find that there had been no infringement of his constitutional rights. (If it nevertheless did reach such a conclusion, that determination, being unnecessary, would not bar further litigation.) The Grievance Committee itself stated in affidavits dated January 6 and February 19, 1986 that the justices had denied relief "in their discretion."

In asserting his constitutional claim, petitioner had, in effect, asked the justices of the Appellate Division to decide whether they and their three griev-

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[4] *Cf.*, *Kremer* v. *Chemical Construction Corp.*, 456 U.S. 461 (1982): "The Appellate Division's affirmance * * * necessarily decided that petitioner's claim * * * was meritless" (p. 480), because "the Appellate Division must find that the petitioner's 'complaint lacks merit as a matter of law.' [citations]" (n. 21) And from Justice Blackmun's dissent: "But the Appellate Division made no finding one way or the other concerning the *merits* of petitioner's * * * claim." (p. 492, emphasis in original)

ance committees[5] have been routinely violating the First Amendment to the United States Constitution. The decision of a tribunal which has sat in judgment of its own cause would not be entitled to preclusive effect.

In lieu of filing affidavits, respondents cited one (and only one) authority in the attempt to prove that they had determined the claim on its merits: *State of New York* v. *Chapman*, 136 AD2d 75 (3d Dept., March 17, 1988).[6] (See A-28.) In that case, however, "[t]he State took no appeal from the [prior] judgment * * * and, thus, is bound by it." *Id.*, at 80. The principle expressed in the footnote quoted by respondents (A-28) applies only where there is some judicial finding to analyze or where, as in *Kremer, supra* (n. 4), the court is required by law to consider the merits of a claim.

The three cases cited by the Court of Appeals in its order (A-1) do more to support petitioner's position than to undermine it. The reference to *Solow* v. *Manhattan School of Music*, 106 AD2d 624 (2d Dept., 1984), is particularly puzzling for, in the prior, related case, *Matter of Mayer*, 110 Misc.2d 346, the Surrogate's Court was required by law to examine the merits of the claim and, judging from its opinion, had carefully done so; the First Department had unanimously affirmed (*Matter of Mayer*, 92 AD2d 756).

The third case (after *Kremer* and *Solow*) is *Gramatan Home Investors Corp.* v. *Lopez*, 46 NY2d 481, 485 (1979), in which New York's highest court stated:

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[5]Since 1980, New York's grievance committees have been State agencies operating under the direct control of the four Appellate Divisions of the Supreme Court.

[6]The opinion was written by Presiding Justice Mahoney, one of the defendants in *Capoccia* v. *Mahoney* (pp. 12, 13, *supra*, and A-19, *infra*). For the sake of appearances, current opinions written by leading figures in New York's lawyer disciplinary system should probably not be cited by respondents in this litigation. Justice Mahoney's opinion, which was not published in the New York Law Journal, was forwarded immediately to the Attorney General's New York City office, and was cited in the Second Circuit Court of Appeals three business days after it was issued.

> As the consequences of a determination that a party is collaterally estopped from litigating a particular issue are great, strict requirements for application of the doctrine must be satisfied to insure that a party not be precluded from obtaining at least one full hearing on his or her claim.

Under New York law, "the existence of any doubt as to whether the previous judgment was on the merits precludes dismissal * * * ." (*Gerzof* v. *Gulotta*, 87 Misc.2d 768, 773 [1976].)

III.

THE RIGHT OF PUBLIC ACCESS TO INFORMATION ABOUT FORMAL, LAWYER DISCIPLINARY PROCEEDINGS IS PROTECTED BY THE FIRST AMENDMENT

Respondents refuse to reveal to petitioner whether new disciplinary charges have been brought against a certain lawyer, and that forms the basis for this First Amendment controversy.

The First Circuit Court of Appeals stated in *Anderson* v. *Cryovac, Inc.*, 805 F.2d 1, 13 (1986), that "[t]he common law presumption that the public may inspect judicial records has been the foundation on which the courts have based the first amendment right of access to judicial proceedings." The existence of a common-law right of access to judicial proceedings is beyond dispute. In New York, the right extends even to administrative proceedings. (See *Matter of Herald Co.* v. *Weisenberg*, 89 AD2d 224 [4th Dept., 1982], *affd* 59 NY2d 378 [1983].)

The First Amendment right of public access to criminal trials was established by this Court in *Richmond Newspapers, Inc.* v. *Virginia*, 448 U.S. 555 (1980). While the Court has not extended the right to civil trials, the Courts of Appeals for the First, Second, Third, Sixth, Seventh, Eighth and Eleventh Circuits have recognized the existence of a qualified

First Amendment right of access either to certain kinds of civil proceedings or to civil proceedings generally. *Publicker Industries, Inc.* v. *Cohen*, 733 F.2d 1059 (CA3, 1984), appears to be the leading case in support of the First Amendment right of access to civil proceedings.

Lawyer disciplinary proceedings are not criminal or civil trials as such, but rather judicial proceedings which are quasi-criminal in nature. (See *In re Ruffalo*, 390 U.S. 544, 551 [1968]; *Erdmann* v. *Stevens*, 458 F.2d 1205, 1209, 1210 [CA2, 1972]; *Mildner* v. *Gulotta*, *supra*, at 191.) Unlike grand jury proceedings, they are full adversary proceedings which result in a determination on the merits of the charges, rather than merely a determination of probable cause. The "unrefutable public interest in the administration of attorney disciplinary proceedings," *Daily Gazette Company, Inc.* v. *Committee on Legal Ethics of the West Virginia State Bar*, 326 S.E.2d 705, 710 (W.Va., 1984), distinguishes them from most other kinds of proceedings, which may involve only the rights and interests of private parties. The disciplinary system is an integral component of the judicial system and, hence, of the process of government. *Id.*, at 714.

As this Court has stated, the First Amendment has the "common core purpose of assuring freedom of communication on matters relating to the functioning of government," *Richmond Newspapers*, *supra*, at 575, and protects the public "from abridgment of their rights of access to information about the operation of their government, including the Judicial Branch." *Id.*, at 584.

In *Press-Enterprise Co.* v. *Superior Court of California*, 464 U.S. 501, 104 S.Ct. 819 (1984) ("*Press Enterprise I*"), which involved the right of access to jury selection, and *Press-Enterprise Co.* v. *Superior Court of California*, 478 U.S. 1, 106 S.Ct. 2735 (1986) ("*Press Enterprise II*"), which concerned the right of access to preliminary proceedings, this Court affirmed the First Amendment right of public access to proceedings which in themselves are not trials:

> [T]he distinction between trials and other official proceedings is not necessarily dispositive, or even important, in evaluating the First Amendment issues. [Justice Stevens, concurring in *Press Enterprise I*, at page 516.]
>
> [T]he First Amendment question cannot be resolved solely on the label we give the event, *i.e.*, "trial" or otherwise, * * * . [*Press Enterprise II*, at page 2740.]

Several of the civil proceedings concerning which the Courts of Appeals have recognized a qualified First Amendment right of access were not actual trials.

In *In re Iowa Freedom of Information Council*, 724 F.2d 658, 661 (1983), the Eighth Circuit found a First Amendment right of access to contempt proceedings -- "hybrid" proceedings having both civil and criminal characteristics. Although their judgments were not fully vindicated on appeal, two other courts found First Amendment rights of access to nontrial proceedings in which, as in lawyer disciplinary proceedings, substantial public interests are directly implicated: *Matter of Herald Co.* v. *Board of Parole*, 131 Misc.2d 36, 499 N.Y.S.2d 301 (1985), *modified* 125 AD2d 985 (4th Dept., 1986) (access to parole revocation hearings), and *First Amendment Coalition* v. *Judicial Inquiry and Review Board*, 579 F.Supp 192 (EDPA, 1984), *vacated* 784 F.2d 467 (CA3, 1986, *in banc*, with four judges dissenting) (access to records of formal, judicial disciplinary proceedings, deemed to be administrative in nature). See also, *Society of Professional Journalists* v. *Secretary of Labor*, 616 F.Supp 569 (D.C., Utah, 1985) (access to administrative hearings on mine disaster).

The quasi-criminal character of lawyer disciplinary proceedings makes the issue of public access a natural subject for analysis through this Court's tests of experience and logic. (See *Press Enterprise II, supra*, at 2740, 2741: "If the particular proceeding in question passes these tests of experience and logic, a qualified First Amendment right of public access attaches.")

Secrecy in proceedings to discipline attorneys in England and America became widespread only with the

rise of formal procedures in the latter half of the nineteenth century. The solicitors branch of the legal profession "emancipated itself from the immediate control of the judges" in gradual steps. (Radcliffe and Cross, *The Legal Profession* [5th Ed., London, 1971], p. 388, n. 2) In 1843, the custody of the official Roll, containing the names of solicitors authorized to practice, was entrusted to the Law Society. Under the Solicitors Act of 1888, the Discipline Committee of the Society, sitting as a court of discipline, began to conduct secret hearings on charges of misconduct.[7]

For most of the nineteenth century in America, there was almost no bar organization at all. In the last third of the century, bar associations as we know them today began to be formed. At the turn of the twentieth century, "integrated bar laws" established disciplinary procedures whereby agencies of the organized bar conducted disciplinary proceedings in private. (James Willard Hurst, *The Growth of American Law: The Law Makers* [Boston, 1950], p. 292.)

The Framers and ratifiers of the First Amendment could not have foreseen that judicial proceedings to discipline officers of the court would in most or all jurisdictions become secret proceedings, shielded completely from public view. There was nothing in English or American law which would have led them to expect such a development. On the contrary, there had been a history of disciplinary proceedings taking place in open court, having been brought by other attorneys or on motion by the court itself. The First Amendment prohibits the "government from summarily closing courtroom doors which had long been open to the public at the time that Amendment was adopted." (*Richmond Newspapers*, *supra*, at 576.)

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[7]Proceedings to discipline barristers had always been closed, but those proceedings are not analagous to modern proceedings. The barrister "was in no sense an officer of the court." (William Holdsworth, *A History of English Law* [London, 1924], v. VI, p. 434.)

The test of logic involves an inquiry into the "value of openness." (*Press Enterprise I*, *supra*, at 508.) Openness in disciplinary proceedings would assure a public skeptical of lawyers and the disciplinary process that the proceedings are conducted fairly to all concerned -- including the public, for whose protection the disciplinary system was created.

CONCLUSION

For the foregoing reasons, petitioner respectfully requests that this petition for a writ of certiorari be granted.

Respectfully submitted,

ROBERT J. NEVILLE

*Petitioner, Pro Se**
5-31 50th Avenue
Long Island City, N. Y. 11101
Tel. No. (212) 333-0055

July 18, 1988

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*If this petition is granted, petitioner will be represented by a member of the Bar of this Court.

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York on the 25th day of March, one thousand nine hundred and eighty-eight.

PRESENT:

HONORABLE GEORGE C. PRATT,

HONORABLE ROGER J. MINER, Circuit Judges,

HONORABLE JOHN M. WALKER, District Judge of the Southern District of New York (sitting by designation).

No. 87-7656

ROBERT J. NEVILLE,

Plaintiff-Appellant,

- against -

MILTON MOLLEN, Individually and as Presiding Justice of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, GUY J. MANGANO, WILLIAM C. THOMPSON, LAWRENCE J. BRACKEN, RICHARD A. BROWN, MOSES M. WEINSTEIN, JAMES F. NIEHOFF, ISAAC RUBIN, CHARLES B. LAWRENCE, GERALDINE T. EIBER, JOSEPH J. KUNZEMAN, SYBIL HART KOOPER, ARTHUR D. SPATT, THOMAS R. SULLIVAN, STANLEY HARWOOD, Individually and as Associate Justices of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, FRANK A. FINNERTY, JR., Individually and as Chief Counsel of the Grievance Committee for the Tenth Judicial District, the GRIEVANCE COMMITTEE FOR THE TENTH JUDICIAL DISTRICT and, Individually, Each of Its Members, and ROBERT ABRAMS, Individually and as Attorney General of the State of New York,

Defendants-Appellees.

This appeal from a judgment of the United States District Court for the Eastern District of New York, Jack B. Weinstein, *Chief Judge*, granting defendants' motion and dismissing the complaint as against all of them, came on to be heard on the transcript of the record and was argued.

ON CONSIDERATION WHEREOF, it is now ordered that the judgment appealed from is affirmed because Robert Neville's claim pursuant to 42 U.S.C. section 1983 is barred under the doctrine of collateral estoppel.

Prior to filing his claim in federal court, Neville brought two proceedings in the New York State courts. His first application was to the Appellate Division of the Supreme Court of the State of New York, pursuant to New York Judiciary Law section 90(10); it sought access to the record in an attorney disciplinary proceeding and challenged the constitutionality of the secrecy requirements of section 90 of the judiciary law based on a claimed first amendment right of public access to quasi-criminal proceedings. His application was denied, and leave to appeal to the New York Court of Appeals was also denied.

Neville's second application to obtain the records was an Article 78 proceeding against the members of the Grievance Committee for the Tenth Judicial District. When this petition was dismissed, Neville took appeals unsuccessfully to the appellate division and the Court of Appeals, and his petition for a writ of certiorari from the United States Supreme Court was denied.

In the federal district court, Neville essentially sought collateral review of these state court proceedings; however, under the full faith and credit statute, 28 U.S.C. section 1738, federal courts must "give the same preclusive effect to state court judgments that those judgments would be given in the courts of the State * * * ." *Kremer* v. *Chemical Construction Corp.*, 456 U.S. 461, 466 (1982).

Neville's claims under the New York Judiciary Law section 90(10) and his claim under the first amendment

have already been presented to the state's appellate division and decided on their merits. In denying Neville's application, the appellate division necessarily determined that he had no first amendment right to the records, which is the issue barred in this litigation. *Cf. Solow* v. *Manhattan School of Music*, 483 N.Y.S.2d 424 (2d Dept., 1984) (where denial of a motion to intervene necessarily determines whether or not plaintiff had a property interest, subsequent litigation over property interest is barred by collateral estoppel). Under New York law, Neville's present challenge is now precluded because it was the subject of a final determination on the merits and Neville had a full and fair opportunity to litigate it. *Gramatan Home Investors Corp.* v. *Lopez*, 46 N.Y.2d 481, 414 N.Y.S.2d 308 (1979).

The judgment of the district court is affirmed.

s/
GEORGE C. PRATT, U.S.C.J.

s/
ROGER J. MINER, U.S.C.J.

s/
JOHN M. WALKER, U.S.D.J.

N.B. This summary order will not be published in the Federal Reporter and should not be cited or otherwise relied upon in unrelated cases before this or any other court.

FILED, March 25, 1988

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York on the 24th day of May, one thousand nine hundred and eighty-eight.

No. 87-7656

ROBERT J. NEVILLE,

Plaintiff-Appellant,

- against -

MILTON MOLLEN, Individually and as Presiding Justice of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, *et al.*,

Defendants-Appellees.

A petition for rehearing containing a suggestion that the action be reheard *in banc* having been filed herein by Appellant *pro se*, Robert J. Neville,

Upon consideration by the panel that heard the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing *in banc* has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

s/
Elaine B. Goldsmith, Clerk

FILED, May 24, 1988

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

ROBERT J. NEVILLE,
Plaintiff,
- against -
MILTON MOLLEN, *et al.*,
Defendants.

CV-87-976

United States Courthouse
Brooklyn, New York
June 29, 1987; 9:30 o'clock a.m.

TRANSCRIPT OF HEARING ON MOTION TO DISMISS
BEFORE THE HONORABLE JACK B. WEINSTEIN
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Plaintiff: ROBERT J. NEVILLE, Pro Se.

For the Defendants: DEPARTMENT OF LAW
STATE OF NEW YORK
By: ABIGAIL I. PETERSEN, ESQ.
Assistant Attorney General

Court Reporter: Henry R. Shapiro
225 Cadman Plaza East
Brooklyn, New York 11201

Proceedings recorded by mechanical stenography; transcript produced by computer.

THE CLERK: Civil motion, Neville versus Mollen.

MS. PETERSEN: Abigail Petersen.

MR. NEVILLE: Robert Neville, pro se.

THE COURT: Yes.

MS. PETERSEN: Your Honor, this is a motion to dismiss the complaint on the ground of--

THE COURT: Yes, as far as the judges are concerned, they were conducting judicial activities. They have immunity, don't they?

MR. NEVILLE: I concede they have immunity from monetary damages, but I have not asked for monetary damages [against the judges].

THE COURT: I cannot force them to conduct a proceeding.

MR. NEVILLE: That is only one aspect of the case. There are many other issues. I'm asserting a First Amendment right. The facts as to the pendency of a proceeding, I would like to know whether one is pending.

THE COURT: I don't believe that the Federal court is required-- You have an application in the state. You can take [an] appeal to the Supreme Court.

MR. NEVILLE: I have exhausted the State remedies. I have not had any sort of hearing--

THE COURT: You have gone up to the Supreme Court on this very issue?

MR. NEVILLE: They didn't address the issue. They decided that they didn't wish to consider the case.

THE COURT: You had an opportunity to raise it, and the Court of Appeals of the State of New York didn't take it, did it?

MR. NEVILLE: Not one court addressed the issues that are raised.

THE COURT: I know you have raised the issue, and they didn't think it was of enough merit for their deciding it. You can't make it a collateral attack after

you exhausted it.

MR. NEVILLE: They have denied me a fair hearing, a hearing of any kind.

THE COURT: I understand that. You have raised that point in your appeal to the Court of Appeals and the Supreme Court, have you not?

MR. NEVILLE: Yes, I have.

THE COURT: And they decided that they don't want to take it.

MR. NEVILLE: Well, they didn't give a reason why they didn't want to take it. It could have been anything.

THE COURT: I understand that.

MR. NEVILLE: I understand pro se petitions to the Supreme Court are granted perhaps one in five hundred cases, something like that. That doesn't mean that all five hundred-- all four hundred and ninety-nine cases are without merit.

THE COURT: It doesn't it. [*sic*] It means that you have had a chance to get a decision of the State [*sic*] and you had all of your chances to appeal it.

MR. NEVILLE: It isn't res judicata--

THE COURT: Pardon me. Hasn't the matter been decided?

MR. NEVILLE: I reject the assertions of res judicata most strongly. The burden of proof is on the defendants to show that the decision was rendered on the merits and thus far they have not even alleged the decision was on the merits, let alone proved it.

THE COURT: You say you want no damages--

MR. NEVILLE: I do request damages, but not against the judges. I request--

THE COURT: Doesn't the complaint request damages against the judges? That is clearly dismissed.

MR. NEVILLE: It doesn't.

MS. PETERSEN: We could look at the complaint.

MR. NEVILLE: Here it is.

MS. PETERSEN: It says amended complaint.

MR. NEVILLE: You have the original.

THE COURT: What do you want against the judges?

MR. NEVILLE: One of my major claims is a Fourteenth Amendment claim that they have not given me a fair hearing. I don't want to-- I don't want them to give me a fair hearing now. I'm not making any specific claim to that allegation. That is just part of the background of the complaint.

THE COURT: What is it that you want now from them?

MR. NEVILLE: I want this court to declare the statute unconstitutional.

THE COURT: In what way?

MR. NEVILLE: It violates my First Amendment rights.

THE COURT: To do what?

MR. NEVILLE: Access to information. I believe that I have a right of access of information to any proceeding of any kind.

THE COURT: I don't believe that is true. There are many proceedings that are sealed. The proceedings with respect to discipline of judges, proceeedings of the State crime commissions, much like the disciplinary rules under the of the [*sic*] Second Circuit. For example, disciplinary hearings very often are secret in order to prevent embarassment, whether justified or not. I express no view as to the policy. The theory is that many unfounded charges are made against people and that they not be published.

MR. NEVILLE: That has been resolved by conducting an investigation to determine there is probable cause--

THE COURT: I am not going to interfere with the State disciplinary proceedings. They are disciplining their own personnel. You haven't made any complaint against these lawyers in our court.

MR. NEVILLE: It's a matter of public interest the way the legal system operates.

THE COURT: I agree. I think a lot more of these materials should be published. On policy I support your view. That doesn't make it unconstitutional to keep some proceedings secret.

MR. NEVILLE: I think it does unless there is a specific reason.

THE COURT: The Legislature has made them secret under the statute.

MR. NEVILLE: That is not enough. There must be a determination on a case by case basis.

THE COURT: I don't agree.

MR. NEVILLE: The Supreme Court used that same formula in Richmond Newspapers versus Virginia--

THE COURT: Yes, that was a criminal--

MR. NEVILLE: These proceedings are quasi-criminal. There is not that much difference.

THE COURT: I understand the position. It may have some merit. I myself don't believe the Federal courts are in a position really on constitutional basis to require the opening up of all of these records, particularly, since the proceeding as I understand it is still under way, isn't that so -- is the proceeding under way?

MS. PETERSEN: I believe it was dismissed a while ago.

THE COURT: It was dismissed. I'm not going to grant that relief. What other relief do you want?

MR. NEVILLE: There is a question of appellate review. I never received review in the State court[s] to which I'm entitled. I'm entitled to review on constitutional grounds.

THE COURT: Well, again you may be right on that. I don't believe that you are necessarily a party to that proceeding. That is a proceeding as I understand it by the disciplinary committee against--

MR. NEVILLE: I mean my own legal action in the State courts.

THE COURT: What action is that?

MR. NEVILLE: The Article 78 proceeding. That was dismissed without cause without any reason--

THE COURT: You could have appealed that.

MR. NEVILLE: I did. They dismissed the appeal. I had a right to that appeal.

THE COURT: I can't say that you are denied any constitutional rights. What were you seeking in the Article 78 proceeding?

MR. NEVILLE: Basically what I'm seeking here--

THE COURT: An opening up of the record.

MR. NEVILLE: Of my records. Not everyone's, just my own.

THE COURT: Your own records to what?

MR. NEVILLE: My complaint.

THE COURT: Against the attorney.

MR. NEVILLE: Right.

THE COURT: You knew what you said.

MR. NEVILLE: I'm interested in seeing what they did about it. The grievance committee got itself involved in misconduct of its own. They suppressed information, withheld it from the Appellate Division.

THE COURT: You may be right. It seems to me this is a political matter and it ought to be handled by the State Crime Commission or by appropriate state committees investigating the propriety of actions of disciplinary committees. This is an internal method of the Appellate Division to discipline its own officers. Whether you have a right there seems to me highly

dubious. You are not a party to those proceedings.

MR. NEVILLE: I'm a complainant to the extent that I supplied much of the evidence. A few hundred pages.

THE COURT: You may complain to the DA and give information and then they investigate and then the grand jury proceed [*sic*], that doesn't mean that you are entitled to the grand jury proceedings. There are many investigatory disciplinary procedures which are internal.

MR. NEVILLE: Once they become formal judicial proceedings-- disciplinary proceedings, then they should be opened to the public.

THE COURT: You say "should." I think that is a policy matter. You are probably right, but as a constitutional matter, I don't see the basis.

MR. NEVILLE: Other state courts have held that. In West Virginia, they found closed disciplinary proceedings were unconstitutional.

THE COURT: Under the State or Federal.

MR. NEVILLE: State. Some of the provisions are similar.

THE COURT: I understand. What other relief are you seeking? I'm not going to grant you access to the internal records of the disciplinary committee.

The Second Circuit has just adopted rules of discipline of the judges and magistrates and Bankruptcy Judges which provide identical provision for secrecy. I opposed them on policy grounds, but they have adopted them and they clearly have ruled internally that they have that power. You will see them in the New York Law Journal. If you like a copy or reference, I'll give them to you. The defense counsel may want to make a note of that. Are you listening?

MS. PETERSEN: Yes, of course I'm listening.

THE COURT: What else do you want?

MR. NEVILLE: Have you considered my argu-

ments?

THE COURT: I read your materials.

MR. NEVILLE: I cannot--

THE COURT: They are very well written. Are you a lawyer?

MR. NEVILLE: No, I'm not.

THE COURT: You write extremely well and you have learned, but I don't see this court has the power to interfere with the internal disciplinary proceedings of the State Court.

MR. NEVILLE: It would be an interference only to the extent of vindication of Federal rights.

THE COURT: I don't believe you have a Federal right to see the internal disciplinary proceedings. I may be wrong.

MR. NEVILLE: As far as my complaint--

THE COURT: You know what that is.

MR. NEVILLE: That is just a state law claim.

THE COURT: I'm not going to take that claim. I'll not accept any pendent jurisdiction. I'll just consider the Federal constitutional issue.

MR. NEVILLE: Doesn't the Federal constitutional issue permit the exercise of pendent jurisdiction?

THE COURT: Permits it, doesn't require it, as I understand the law. I have no intention of accepting any State claim here. I'll just consider the Federal claim. I do not believe you have a Federal constitutional claim to examine the internal records of the disciplinary committee.

MR. NEVILLE: I would concede that as far as my own complaint is concerned, as I say that is a State matter, but if there-- if there is a formal pending proceeding, then I think under Federal law I have a right to at least know whether it's pending.

THE COURT: The attorney for the defendants says the proceeding is not pending, it has been closed.

MR. NEVILLE: This is news to me.

MS. PETERSEN: I'm basing it solely on the plaintiff's papers. There is a statement by the disciplinary committee that the matter has been dismissed.

MR. NEVILLE: I think that was a reference to my [disciplinary] complaint, was it not?

If the Assistant Attorney General is relying on my papers--

MS. PETERSEN: This is a motion to dismiss.

THE COURT: You don't know whether there is a pending proceeding.

MR. NEVILLE: There may be a formal pending proceeding. I think I have a right to know whether it's pending, particularly since I provided all the information. If I went downstairs--

THE COURT: I think as a matter of policy you should have that right, as a matter of constitutional right [*sic*], it's just like a grand jury-- not just-- it's analagous to a grand jury proceeding. You may furnish material to the DA which the DA gives to the grand jury. Do you have a right to know what the grand jury is doing? I don't think so. There are many procedures under our jurisprudence of this nature.

MR. NEVILLE: I think one of the differences would be an attorney [is an] officer of the court, and he's more involved with the system of justice--

THE COURT: I agree with you, as a matter of policy you should have this information available, and these matters should not be secret. I don't believe you have a constitutional right to see these papers. In effect, it's a matter of the court deciding whether it shall proceed against the defendant -- the attorney, member of the bar.

MR. NEVILLE: As far as the complaint itself is concerned, a motion to dismiss only tests the sufficiency of the complaint, without going to the merits. I think now we seem to be going to the merits.

THE COURT: I know, that is because I see no

merit in your position as a constitutional matter. The relief you seek as I understand it, [is] to open up the proceedings, if they are continuing, so you know what is going on.

MR. NEVILLE: I would like to be informed whether a proceeding is pending. If it is, my second demand is the right of access. But I will take whatever I can get. If I'm informed a proceeding is pending and I can't gain access, I would have gotten half of what I ask for.

THE COURT: I'll not issue an order either way. I don't believe it's appropriate for this court to become involved in the internal disciplinary proceedings of the State courts.

MR. NEVILLE: When Federal law is involved, I think the court--

THE COURT: If Federal law is involved. I don't believe there is any Federal law.

MR. NEVILLE: If that is true, your Honor, then the First Amendment would have very little meaning as far as protecting public rights of access to information about judicial proceedings. If I went downstairs to the clerk's office and demanded some document about a pending proceeding, and he refused to give it to me, I think that would be a violation of First Amendment rights. I think anything that is a public record-- or that pertains to pending judicial proceedings, is a matter of public record.

THE COURT: I understand your position. I don't think that the right of access extends to disciplinary proceedings. The obvious reason [is] that many of these disciplinary complaints are scurrilous and without any merit at all, and this rule was designed to protect against the publication of those scurrilous matters. I agree with you on policy that it shouldn't be secret.

MR. NEVILLE: In this case, that would not apply at all. All of the information is already a matter of public record.

THE COURT: Your complaint.

MR. NEVILLE: The second matter, involving all the crimes that were committed; it was on the front page of the newspapers. It's well known, and there is no justification for sealing information about the proceedings on the basis that it might damage the attorney's reputation.

THE COURT: That's general policy.

MR. NEVILLE: That is why I think it should turn on a case by case basis.

THE COURT: I'll not get involved in supervising the disciplinary proceedings of the State court on a case by case basis.

It makes no sense. That is an independent court system; under the supremacy clause, they have to follow the Federal Constitution, and I don't see any reason to believe that they did not and have not.

MR. NEVILLE: They have--

THE COURT: And are not.

MR. NEVILLE: I have not seen anything resembling fair play in my experience in the State courts. They rejected every paper that I submitted without any comment whatever.

THE COURT: This was in the Second Department?

MR. NEVILLE: Pardon me?

THE COURT: This was in the Second Department?

MR. NEVILLE: Yes.

THE COURT: The Appellate Division has a reputation of being a very fair court, and the presiding justice has intervened to prevent injustice on many occasions.

MR. NEVILLE: This is a case in which the Court's own interest is involved.

THE COURT: I don't see why.

THE COURT: It's grievance committee engaged in misconduct, and I don't think they want to hear about it.

THE COURT: That doesn't make sense to me. On the grounds of res judicata, collateral estoppel and the lack of any merit, in the substantive rights alleged, the case is dismissed. Submit a judgment immediately. You can take an appeal to the Court of Appeals. Perhaps you are right.

Order a copy of the record, attach it. The judgment will say dismissed on these grounds and for the reasons stated orally on the record. You can take an appeal from Court of Appeals and get up to the Supreme Court. You certainly argue very well. What is your background?

MR. NEVILLE: I attended one semester of law school.

THE COURT: Which law school?

MR. NEVILLE: Boston University. Didn't like it.

THE COURT: Too bad, you could have reformed the law.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

No. CV-87-976

ROBERT J. NEVILLE,

Plaintiff,

- against -

MILTON MOLLEN, Individually and as Presiding Justice of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, GUY J. MANGANO, WILLIAM C. THOMPSON, LAWRENCE J. BRACKEN, RICHARD A. BROWN, MOSES M. WEINSTEIN, JAMES F. NIEHOFF, ISAAC RUBIN, CHARLES B. LAWRENCE, GERALDINE T. EIBER, JOSEPH J. KUNZEMAN, SYBIL HART KOOPER, ARTHUR D. SPATT, THOMAS R. SULLIVAN, STANLEY HARWOOD, Individually and as Associate Justices of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, FRANK A. FINNERTY, JR., Individually and as Chief Counsel of the Grievance Committee for the Tenth Judicial District, the GRIEVANCE COMMITTEE FOR THE TENTH JUDICIAL DISTRICT and, Individually, Each of Its Members, and ROBERT ABRAMS, Individually and as Attorney General of the State of New York,

Defendants.

ORDER

For the reasons stated orally on the record, the complaint is dismissed. No costs or disbursements. So ordered.

Dated: Brooklyn, New York
July 8, 1987 [Filed, July 9, 1987]

s/
JACK B. WEINSTEIN, U.S.D.J.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

No. CV-87-976

ROBERT J. NEVILLE,

Plaintiff,

- against -

MILTON MOLLEN, Individually and as Presiding Justice of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, GUY J. MANGANO, WILLIAM C. THOMPSON, LAWRENCE J. BRACKEN, RICHARD A. BROWN, MOSES M. WEINSTEIN, JAMES F. NIEHOFF, ISAAC RUBIN, CHARLES B. LAWRENCE, GERALDINE T. EIBER, JOSEPHJ. KUNZEMAN, SYBIL HART KOOPER, ARTHUR D. SPATT, THOMAS R. SULLIVAN, STANLEY HARWOOD, Individually and as Associate Justices of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, FRANK A. FINNERTY, JR., Individually and as Chief Counsel of the Grievance Committee for the Tenth Judicial District, the GRIEVANCE COMMITTEE FOR THE TENTH JUDICIAL DISTRICT and, Individually, Each of Its Members, and ROBERT ABRAMS, Individually and as Attorney General of the State of New York,

Defendants.

ORDER

This case was reassigned after Chief Judge Weinstein recused himself. The court has considered all of plaintiff's pending motions and denies them. So ordered.

Dated: Brooklyn, New York
October 30, 1987 [Filed, November 2, 1987]

s/
EUGENE H. NICKERSON, U.S.D.J.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York on the 29th day of March, one thousand nine hundred and eighty-three.

PRESENT:

HONORABLE AMALYA L. KEARSE,
HONORABLE LAWRENCE W. PIERCE,
HONORABLE GEORGE C. PRATT, Circuit Judges.

Nos. 83-7022, 7134

ANDREW F. CAPOCCIA,

Plaintiff-Appellant,

- against -

A. FRANKLIN MAHONEY, as Presiding Justice of the Appellate Division of the State of New York, in and for the Third Judicial Department, and RICHARD T. AULISI, as Chairman of the Committee on Professional Standards of the Third Judicial Department of the State of New York,

Defendants-Appellees,

Appeal from the United States District Court for the Northern District of New York.

This cause came on to be heard on the transcript of the record from the United States District Court for

the Northern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order and judgment of said District Court be and they hereby are affirmed.

Plaintiff Andrew F. Capoccia appeals from an order and judgment of the United States District Court for the Northern District of New York, Roger J. Miner, *Judge*, denying his motion for a preliminary injunction and dismissing his complaint. Capoccia, a New York attorney against whom charges of professional misconduct are pending before the state's Committee on Professional Standards for the Third Judicial Department ("Committee"), commenced the present action under 42 U.S.C. § 1983 to compel the Committee to conduct its hearing regarding Capoccia in public rather than *in camera* pursuant to § 90(10) of the Judiciary Law of the State of New York, and sought a preliminary injunction granting that relief pending a decision in federal court of his contention that the holding of *in camera* hearings violates his constitutional rights. Capoccia had requested the state court to compel the Committee to conduct an open hearing; this request was denied by the Appellate Division, Third Department, and leave to appeal to the New York Court of Appeals was denied. Hearings were thereafter held *in camera* before a referee; the Committee has not yet moved to have the Appellate Division confirm or disaffirm the referee's report. The district court in the present action denied Capoccia's motion for a preliminary injunction on grounds of collateral estoppel, abstention, and mootness. Thereafter, the court dismissed the complaint on grounds of collateral estoppel and abstention. We conclude that the district court properly denied relief on grounds of abstention, and we affirm on that basis.

The abstention doctrine of *Younger* v. *Harris*, 401 U.S. 37 (1971), is applicable to state bar disciplinary proceedings of a judicial nature, so long as the subject attorney has an adequate opportunity to present his federal challenges in the ongoing state proceedings,

and so long as there has been no showing of bad faith, harassment, or other exceptional circumstances to suggest that abstention is inappropriate. *Middlesex County Ethics Committee* v. *Garden State Bar Ass'n*, 102 S.Ct. 2515 (1982). We conclude that both conditions are met.

Notwithstanding the Appellate Division's interlocutory denial of Capoccia's request for a public hearing by the Commitee, we see no basis for believing that Capoccia will not have both another opportunity to challenge before the Appellate Division the *in camera* nature of the proceedings, upon a Committee recommendation of disciplinary action, and the right to appeal an adverse decision of the Appellate Division to the Court of Appeals. *See* N. Y. Jud. Law § 90(8) (McKinney 1983). The willingness of the latter court to vindicate an attorney's constitutional rights in such a proceeding has been demonstrated. *See Gordon* v. *Committee on Character and Fitness*, 48 N.Y.2d 266 (1978). Thus, "[w]hatever federal constitutional questions are involved here can certainly be raised in the state courts and ultimately addressed to the Supreme Court." *Anonymous* v. *Association of the Bar of the City of New York*, 515 F.2d 427, 432 (2d Cir.), *cert. denied* 423 U.S. 863 (1975). Further, we note that N. Y. Jud. Law § 90(10) has not been construed by the New York Court of Appeals, and it is possible that Capoccia's claim could be upheld as a matter of state law, without the need to reach a constitutional issue.

The record does not reveal any special circumstances that would make abstention inappropriate. The district court found that Capoccia's contentions of bad faith were based on conclusory allegations. Capoccia's specific assertion of bad faith related to one member of the Committee and did not concern the integrity or fairness of the state courts. The Appellate Division referred the charge of bad faith to the hearing referee, whose judgment in the matter, along with the public hearing claim, may be reviewed by the Appellate Division upon direct review.

In all of the circumstances, the federal court should abstain from considering Capoccia's claims while

the state proceedings are pending. The order and judgment of the district court are therefore affirmed.

s/
AMALYA L. KEARSE, U.S.C.J.

s/
LAWRENCE W. PIERCE, U.S.C.J.

s/
GEORGE C. PRATT, U.S.C.J.

N.B. Since this statement does not constitute a formal opinion of this court and is not uniformly available to all parties, it shall not be reported, cited or otherwise used in unrelated cases before this or any other court.

[Permission to cite and reproduce this opinion herein was granted by the Clerk of the Supreme Court of the United States on May 18, 1988.]

At a Term of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, held in Kings County on November 8, 1985.

HON. MILTON MOLLEN, Presiding Justice,
HON. LEON D. LAZER,
HON. GUY J. MANGANO,
HON. DAVID T. GIBBONS,
HON. JAMES F. NIEHOFF, Associate Justices.

In the Matter of ROBERT J. NEVILLE,

Petitioner,

v.

THE GRIEVANCE COMMITTEE FOR THE TENTH JUDICIAL DISTRICT,

Respondent.

ORDER

In the above entitled matter, the above named Robert J. Neville, petitioner, having made two applications to this court, dated August 16, 1985 and September 17, 1985, respectively, to compel the respondent (1) to disclose to said petitioner all of the facts concerning its alleged investigation of his complaint against a certain attorney and counselor at law, Walter D. O'Hearn, Jr., (2) to reveal to the petitioner whether there is now pending any investigation or proceeding concerning any alleged professional misconduct by said attorney and (3) to describe any such investigation and proceeding;

Now, upon the said applications and the papers annexed thereto in support of the said applications; and upon all the papers filed herein; and the matter having been submitted by Robert J. Neville, petitioner *pro se*, due deliberation have been had thereon; and upon this court's decision slip heretofore filed and made a part hereof, it is

ORDERED that the said applications are hereby denied.

ENTER:

IRVING N. SELKIN
Clerk of the Appellate Division
November 8, 1985

STATE OF NEW YORK
COURT OF APPEALS

Donald M. Sheraw
Clerk of the Court

Clerk's Office
Albany 12207

January 8, 1986

Mr. Robert J. Neville
P. O. Box 31 RCU
New York, New York 10185

Re: *Robert J. Neville* v. *The Grievance Committee*

Dear Mr. Neville:

The papers you filed on December 10, 1985 are being treated as a motion for leave to appeal under CPLR 5602. You will be notified when the Court decides the motion.

The Court has also received your 500.2 jurisdictional statement in support of your notice of appeal as or right under CPLR 5601(b)(1) and may examine its subject matter jurisdiction with respect to whether the order appealed finally determines an action or proceeding (CPLR 5601), and whether a substantial constitutional question is directly involved to support an appeal as of right (CPLR 5601[b][1]).

This communication is without prejudice to any motion any party may wish to make. If you conclude that the order is not appealable as of right, please arrange for the execution of a stipulation consenting to a dismissal of the appeal and transmit that paper to my office. If a stipulation is to be forthcoming, please inform me immediately.

On the other hand, if you wish to persevere in the appeal, you are invited to present to the Court in writing within ten days of this letter's date your comments justifying the retention of subject matter

jurisdiction. Your adversary is likewise afforded this opportunity.

If this *sua sponte* inquiry is terminated by the Court, the Clerk will notify counsel in writing and set a new schedule for normal perfecting of the appeal.

Very truly yours,

s/

Donald M. Sheraw

KCB:pk

cc: Frank A. Finnerty, Jr.
Chief Counsel, Grievance Committee

[New York Court of Appeals]

[*Matter of Neville* v. *Grievance Committee*]

MEMORANDUM IN SUPPORT OF MOTION FOR REARGUMENT OF MOTION FOR LEAVE TO APPEAL

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A. Where there is evidence of fraud perpetrated by the investigating agency, a complainant has a legal right to inspect records relating to his complaint.

B. Section 90, subdivision 10, of the Judiciary Law violates the First and Fourteenth Amendments to the United States Constitution and Article I, section 8, of the New York State Constitution.

C. Section 90, subdivision 10, of the Judiciary Law is in conflict with the open courts statute.

D. An appeal is required in the interests of substantial justice.

Conclusion 8

[February 13, 1986]

STATE OF NEW YORK
DEPARTMENT OF LAW

120 Broadway
New York, N. Y. 10271
(212) 341-2020

ROBERT ABRAMS
Attorney General

LAWRENCE S. KAHN
Deputy Solicitor General

March 22, 1988

BY HAND

Ms. Elaine B. Goldsmith
Clerk of the Court
United States Court of Appeals
for the Second Circuit
United States Courthouse
Foley Square
New York, New York 10007

Re: *Neville v. Mollen, 87-7656*

Dear Ms. Goldsmith:

Appellees respectfully submit this letter in response to the motion filed by appellant for leave to file a post-argument memorandum, and to bring to the Court's attention, pursuant to *Fed.R.App.Pro.*28(j), a decision of the Appellate Division, Third Department, rendered following oral argument of this appeal. I am enclosing three additional original copies of this letter for distribution to the members of the panel that heard the appeal.

In *State of New York* v. *Chapman*, [136] A.D.2d. [75] (3rd Dept., March 17, 1988) (copy enclosed), the Appellate Division stated:

> An order or judgment is entitled to collateral estoppel effect notwithstanding the fact that it does not specify the findings which form the basis

> therefor so long as it can be determined what issues were necessarily decided. (See, Siegel, N. Y. Prac. 464, at 614.)

Slip op. at 5n.

Here, although in dismissing petitioner's state court proceedings brought in 1985, the Appellate Division dismissed the petition without opinion (App. Br., A-7), the Court necessarily rejected appellant's First Amendment claim. As appellant himself stated in his brief in this Court, the First Amendment claim was squarely before the Appellate Division. (App. Br. at 3, 13). Given the absence of any procedural or jurisdictional defenses (see App. Br. at 3: "[There was] no appearance by the [Grievance] Committee"), and the fact that the Appellate Division had jurisdiction over the proceeding, N. Y. Jud. Law § 90(10), the Appellate Division's dismissal necessarily constituted a rejection on the merits of appellant's First Amendment claim.

Accordingly, appellees respectfully submit that appellant's post-argument motion should be denied and the judgment below affirmed.

Thank you for your consideration.

Very truly yours,

s/

Abigail I. Petersen

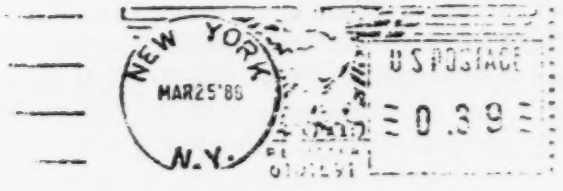
AIP:wr

cc: Robert J. Neville

NOTE

Petitioner's copy of the Attorney General's letter dated March 22, 1988 was apparently not mailed until March 25, 1988, the date of the postage meter mark on the envelope (reproduced below). March 25th was the date on which the Court's decision on the appeal was handed down. Petitioner received his copy of the letter on Monday, March 28th, and went to the Courthouse on that day to inform the Court that he wished to respond. While there, he was informed that the appeal had already been decided.

As noted in the text of the petition (p. 9), the preclusion issue on which the appeal was decided was raised by respondents for the first time at oral argument; it appeared in writing for the first time in the letter of March 22nd.



WALTER O'HEARN'S CRIMES

The following is a list of allegations of wrongdoing by Walter D. O'Hearn, Jr. Between 75 and 120 individual acts of wrongdoing, committed over a period of years in the 1970's, have been alleged. The Grievance Committee limited the disciplinary charges to less than one half of the crimes in one of the following categories (no. 26) - those for which guilty pleas had been entered - and recommended that no public discipline be imposed.

Walter O'Hearn was the president of his company - McGrath Services Corporation, the parent company - and was in a position to prevent the commission of crimes by company employees.

1. ALLOWING COMMERCIAL BRIBERY BY WILLIAM MONTELLA, General Manager of Quin Marine Services, Inc. (waterfront carpentry), a McGrath company (admitted); allowing overbilling by Quin. (Montella committed hundreds of felonies and stole millions of dollars from the steamship companies serviced by Quin, probably splitting it with O'Hearn.)

2. AUTHORIZING MONTELLA TO ACCEPT ILLEGAL KICKBACKS FROM SUPPLIERS. (Admitted) Millions of dollars of Quin Marine's illegal profits were converted into cash with the cooperation of its suppliers.

3. ALLOWING MONTELLA TO MAKE ILLEGAL PAYMENTS TO UNION OFFICIALS ON BEHALF OF QUIN MARINE. (Admitted) These payments amounted to hundreds of thousands of dollars.

4. ADVISING MONTELLA TO STEAL FROM THEIR OWN COMPANY IN LIEU OF A RAISE (according to Montella's testimony), so that all of McGrath's managers, in 26 ports, would not have to be given raises.

5. As Chairman of the Board of McGrath Services Corporation, failing to report Montella to McGrath stockholders; FAILING TO REPORT MONTELLA TO THE DISTRICT ATTORNEY OR THE UNITED STATES ATTORNEY; FAILING TO REPORT MONTELLA TO THE WATERFRONT COMMISSION; VOLUNTARILY APPEARING TO TESTIFY BEFORE THE COMMISSION ABOUT MONTELLA'S ALLEGED GOOD CHARACTER AND INTEGRITY. (All admitted)

6. ALLOWING BRIBERY BY ROBERT J. NICOL, a McGrath officer (the Nicol-Braunstein payments). (Admitted)

7. ALLOWING BRIBERY BY HEIMAN G. GROSS, a McGrath officer (the Gross-LaChance payments). (Admitted)

8. Defrauding Lucille Kritikos, an elderly woman; soliciting confidential information from her lawyer.

9. COMMENCING A LEGAL PROCEEDING BASED WHOLLY ON DECEIT, AND PERPETRATING A FRAUD ON THE APPELLATE DIVISION: the Article 78 proceeding to challenge the Waterfront Commission's denial of Montella's pier superintendent's license. Neither the Commission nor the court was aware that Montella was engaged in illegal activity. The court found that he did not lack good character.

10. Conspiring with Montella to split an illegal commission if Quin Marine were sold.

11. Re meetings with Anthony Pimpinella and John Marano, known to be engaged in criminal activity.

12. Making a $10,000 payment to New Jersey ILA official Willie Murphy at an ILA convention in Miami.

13. Failing to take proper action after learning that Quin Marine was collecting assessments for the Waterfront Commission but not turning over the money.

14. MAIL AND WIRE FRAUD.

15. Personal income tax fraud.

16. Theft of services in Southampton.

17. With law clients Anne and Raymond J. O'Brien and while acting in a professional capacity, LOOTING THE ESTATE OF EILEEN F. McGRATH; PERPETRATING A FRAUD ON THE SURROGATE'S COURT.

18. While acting in a fiduciary capacity, FRAUD IN THE ESTATE OF JOHN W. McGRATH, at a cost to trust beneficiaries of two million dollars; PERJURY.

19. Failing to make restitution to the steamship companies admittedly defrauded by McGrath; refusing demands for restitution.

20. PERJURY, 1979-1982; calling three of his own attorneys to testify as character witnesses at his disciplinary proceeding, without revealing that they were his attorneys (one worked on the disciplinary case).

21. Allowing Mob-connected elements and thugs to operate at McGrath; possible approval of or acquiescence in the arrangements made by a McGrath officer (David Rosen) to kill Douglas LaChance and another union official.

22. MAKING FALSE SWORN STATEMENTS TO THE WATERFRONT COMMISSION. (Admitted)

23. Failing to maintain accurate corporate books and records, as required by law. (Admitted)

24. CORPORATE INCOME TAX FRAUD. (Admitted)

25. RAISING CASH IN AN ILLEGAL MANNER (by various means). (Admitted)

26. MAKING $210,000 IN ILLEGAL CASH PAYMENTS TO ANTHONY M. SCOTTO of the International Longshoremen's Association on behalf of John W. McGrath Corporation (stevedoring). (Admitted)

27. MAKING $40,000 IN ILLEGAL CASH PAYMENTS TO DOUGLAS LaCHANCE, President of the Newspaper and Mail Deliverers Union of New York and Vicinity, as part of a $60,000 payoff (unrelated to the Gross-LaChance payments) made on behalf of Metropolitan News Company (newspaper distribution), a McGrath company. (Admitted)

The activities referred to above gave rise to the following proceedings (in chronological order, 1972-83):

Matter of John W. McGrath's Estate
Matter of Quin Marine Services, Inc. v.
*Waterfront Commission of New York Harbor**
United States v. *Montella*
United States v. *Quin Marine Services, Inc.*
United States v. *O'Hearn*
United States v. *Rosen*
United States v. *McGrath Services Corporation*
United States v. *Scotto and Anastasio**
United States v. *Clemente**
United States v. *LaChance*
Matter of John W. McGrath Corporation
(Waterfront Commission proceedings)
Hellenic Lines, Ltd. v. *O'Hearn* (USDC, SDNY)*
*Matter of O'Hearn** (disciplinary proceeding)

NOTE: Walter O'Hearn maintained that the unlawful labor payments made on behalf of the McGrath companies were extorted, a defense rejected by the Waterfront Commission and accepted by the Grievance Committee. The president of John W. McGrath Corporation and three of the four top executives at the parent company (O'Hearn, Nicol, Wallach and Gross) were (and are) lawyers.

*Published opinions.

NEW YORK JUDICIARY LAW

Section 90, subdivision 10

Any statute or rule to the contrary notwithstanding, all papers, records and documents upon the application or examination of any person for admission as an attorney and counsellor at law and upon any complaint, inquiry, investigation or proceeding relating to the conduct or discipline of an attorney or attorneys, shall be sealed and be deemed private and confidential. However, upon good cause being shown, the justices of the appellate division having jurisdiction are empowered, in their discretion, by written order, to permit to be divulged all or any part of such papers, records and documents. In the discretion of the presiding or acting presiding justice of said appellate division, such order may be made either without notice to the persons or attorneys to be affected thereby or upon such notice to them as he may direct. In furtherance of the purpose of this subdivision, said justices are also empowered, in their discretion, from time to time to make such rules as they may deem necessary. Without regard to the foregoing, in the event that charges are sustained by the justices of the appellate division having jurisdiction in any complaint, investigation or proceeding relating to the conduct or discipline of any attorney, the records and documents in relation thereto shall be deemed public records.